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Insanity as a Defense: The Bifurcated Trial[†]

David W. Louisell and Geoffrey C. Hazard, Jr.***

SECTION 1016 of the California Penal Code provides for five kinds of pleas in criminal cases: (1) guilty; (2) not guilty; (3) a former judgment of conviction or acquittal of the offense charged; (4) once in jeopardy; and (5) not guilty by reason of insanity. Section 1026 provides that when a defendant pleads not guilty by reason of insanity and also enters another plea or pleas, he shall first be tried on the other plea or pleas; in that trial he shall be conclusively presumed to have been sane at the time the crime was committed. Should he be found guilty, the issue of insanity is then tried, either before the same jury or a new one. This separation of a criminal case involving the defense of insanity into two parts has produced in California a system that is popularly designated the "bifurcated trial." How wise is this system? How well does it work?

Before exploring the history and present structure of the bifurcated trial procedure, it is necessary to review the manner in which the law treats the relation between mental condition and criminal responsibility. As far as we know, all jurisdictions attempt to exculpate those who because of mental disease are not responsible for acts otherwise punishable under the law. This fundamental notion is sometimes expressed by saying that a mentally diseased person is *incapable* of committing a crime. Formulated in this way, the problem of mental disease—insanity—is inseparable from the ascertainment of guilt, for by definition a person incapable of committing a crime cannot be guilty of it. On the other hand, the notion that a mentally ill person should not be held criminally responsible is sometimes expressed by saying that a mentally ill person is not subject to

[†] This article is based upon a study made at the request of the California Law Revision Commission and pursuant to contract between it and Professor David W. Louisell. Its title is: "A study to determine whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent at the first trial." The opinions, conclusions, and recommendations are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, and recommendations of the Law Revision Commission.

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punishment for his crime. Formulated this way, the problem of mental disease does not involve the determination of guilt; by definition, insane persons who commit criminal acts are assumed to be guilty, but are *saved* from punishment otherwise forthcoming.

The California law has been inconsistent on this vital threshold issue. The statute defining the relation between insanity and criminality¹ appears to be based on the first viewpoint, *i.e.*, that insanity renders the defendant incapable of crime. The separate trial provision, on the other hand, is clearly based on the second viewpoint, *i.e.*, that insanity excuses the defendant's conduct, but that the conduct was nevertheless criminal.² The case law has from time to time reflected one view and then the other, and in recent years the cases seem to be attempting to adhere to both theories.³

I

LEGISLATIVE HISTORY OF THE CALIFORNIA SEPARATE TRIAL PROVISIONS

The separate trial provisions, enacted in 1927, were added to an existing statutory structure on the subject of insanity, the central feature of which was and is Penal Code section 26. That section provides as follows:

All persons are capable of committing crimes except those belonging to the following classes:

One—Children . . .

Two—Idiots.

Three—Lunatics and insane persons.

Four—Persons who committed the act . . . under an ignorance or mistake of fact, which disproves any criminal intent.

¹ CAL. PEN. CODE § 26.

² This follows because, where defendant pleads not guilty and not guilty by reason of insanity, and the jury at the first hearing convicts him, the jury necessarily makes a determination that defendant is "guilty." In murder cases, for example, to make the finding of "guilty," the jury has to make a determination about defendant's state of mind at the time of the crime, *i.e.*, whether he "deliberated" in the way necessary for first degree murder, whether he had the mental state required for second degree murder, or whether his mental state was such that he was guilty only of manslaughter. Thus, it is absurd to say, with respect to any crime in which a specific intent is required, that "guilt" can be established merely by determining what was the defendant's overt physical act. "It would seem elementary that a plea of not guilty to a charge of murder puts in issue the existence of the particular mental states which are essential elements of the two degrees of murder and of manslaughter. . . ." *People v. Gorshen*, 51 Cal. 2d 716, 733, 336 P.2d 492, 502 (1959). The fact that the matter of the insanity of the defendant goes to the question of the criminality of his conduct underlies the difficulties inhering in the separate trial procedure.

³ Compare the discussion in which insanity is spoken of as though it were a matter of confession and avoidance, Royal Commission on Capital Punishment Report 79, 98 (1953), with the discussion in which insanity seems to be spoken of as a matter inseparable from the problem of guilt, *id.* at 74. The American Law Institute's discussion appears to have the same ambiguity. See MODEL PENAL CODE (Tent. Draft No. 4, 1955).

Five—Persons who committed the act charged without being conscious thereof.

Six—Persons who committed the act or made the omission charged through misfortune or by accident

Seven—Married women . . . acting under the . . . coercion of their husbands.

Eight—Persons . . . who committed the act . . . under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.⁴

It is unnecessary to completely restate the pre-1927 law of California on the subject of insanity. The courts, in placing the burden on the defendant to prove insanity by a fair preponderance of the evidence,⁵ used language implying an assumption that insanity, as the sole defense, was akin to a plea of confession and avoidance: confession of the crime and avoidance of responsibility for it. If such an assumption was made it may be said that the courts approached insanity from the second viewpoint mentioned above. Whatever the significance of the cases prior to 1927, however, the 1927 legislation providing for separate trial was a major departure from the existing law. For this reason, 1927 may properly be taken as the starting place for our review of the current law.

The separate trial provisions were devised by the Commission for the Reform of Criminal Procedure. The Commission was created in 1925, apparently in response to the rising tide of crime that the 1920's witnessed. The legislative resolution establishing the Commission directed it to "provide this state with the most efficient system for the swift and certain administration of criminal justice."⁶ The Commission recommended a whole series of changes in criminal procedure, of which the separate trial of insanity was but one.

While many of the changes urged by the Commission were long overdue and unquestionably sound, it seems fair to say that the Commission was prosecution-minded. This is evident not only from the tenor of its recommendations, but also from the composition of the Commission⁷ and from its comments on its work.⁸ Indeed, in the light of the directions that

⁴ It will be noted that this section speaks of conditions rendering a person *incapable* of committing crime. Some of the categories, including the insanity category, are susceptible of this analysis. Yet categories Seven and Eight seem to include circumstances that do not negative the commission of a crime, but rather completely excuse it. The fact that insanity is thus thrown into an undifferentiated group of categories may help to explain the persistent confusion and uncertainty in the California law on the insanity problem.

⁵ See *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (1914).

⁶ Cal. Stat. 1925 ch. 346, p. 623.

⁷ See *The Reform of Criminal Procedure*, 1 CAL. S.B.J. 103 (1926).

⁸ See California Commission for the Reform of Criminal Procedure, *Report* 3-6 (1927); *The Reform of Criminal Procedure*, 1 CAL. S.B.J. 103 (1926); *The Story of the Yosemite Convention*, 1 CAL. S.B.J. 28, 31-32 (1926) (Tuller's address to convention re criminal procedure); Tuller, *California's New Code of Criminal Procedure*, 2 CAL. S.B.J. 4 (1927).

the legislature issued the Commission, it could hardly have acted otherwise. Even so, the problem of the insanity defense was approached in a manner that hardly appears detached. The Commission seems to have regarded the claim of insanity as a sham defense used by the obviously guilty to gull juries into verdicts of acquittal. As the Commission said:

The abuses of the present system are great. Under a plea of "not guilty" and without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged. This lack of notice that such defense would be made has very frequently placed the people at a very great disadvantage. An even more serious fault of the present system is that a defendant, when on trial as to whether he committed the offense, is able to bring into the case the whole matter of his sanity at the time of the offense charged. This enables him to submit to the jury great masses of evidence having no bearing upon the question whether the offense was committed. This is frequently made the basis of appeals to the sympathy or prejudice of the jury and even though this is not done, often introduces great confusion into the trial.⁹

No doubt there were abuses of the plea,¹⁰ though it is doubtful whether they were as serious as the Commission seemed to think.¹¹ More funda-

⁹ California Commission for the Reform of Criminal Procedure, *Report* 16-17 (1927). See also *The Reform of Criminal Procedure*, 1 CAL. S.B.J. 103, 104 (1926): "In the past this plea has frequently been made, not in good faith, but in order to open the way for the introduction of evidence designed to appeal to the sympathy, passion or prejudice of the jury, and this has very often resulted in gross miscarriages of justice."

¹⁰ See Shepherd, *Not Guilty by Reason of Insanity*, 2 SO. CAL. L. REV. 53 (1928).

¹¹ Consideration of the difficulties of criminal cases involving insanity perhaps has over-emphasized the insanity issue itself, and consequently has not paid enough attention to the complex evidence problems that these cases present. On the issue of insanity the law of evidence has allowed defendant to portray almost without limit his life history, its disappointments and tragedies. See *People v. Leong Fook*, 206 Cal. 64, 72, 273 Pac. 779, 782 (1928). Naturally, this type of evidence potentially invokes considerations of the very kind the Commission wanted to eliminate from the first trial—appeal to sympathy. See text at note 9 *supra*. Yet it may be doubted whether the full history of defendant is any less relevant to modern psychiatric diagnosis than it was (or at least was deemed to be) to the "common sense" approach to insanity of an earlier day. The rules of evidence on insanity do not seem to have been materially changed in recent times. See *People v. Webb*, 143 Cal. App. 2d 402, 300 P.2d 130 (1956), discussed in the text at note 60 *infra*. The rule that defendant has the burden of proving insanity, see *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (1914), while analytically unsound, probably evolved as a rough counter-balance to the evidentiary license accorded defendants in criminal cases. The inherent difficulties of this evidence problem are of course beyond the scope of this study; but in our opinion they are difficulties that the growth of psychiatric knowledge does not necessarily lessen. It seems paradoxical that in the District of Columbia today it is often the prosecution that seeks a determination of insanity, rather than the defense. This apparently occurs in cases where the offense charged bears only a short prison term, but acquittal because of insanity would result in confinement for an indefinite period, *i.e.*, until defendant establishes that he is free from an "abnormal mental condition" that renders him dangerous. As put by Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 939 (1961):

mental than its attitude, however, was the Commission's apparent belief, not unnatural in the light of the case law in California, that the defendant's sanity was irrelevant in determining whether he committed the crime of which he was charged. This premise is implicit in the form of the Commission's recommendations, and is explicit in Chairman Tuller's explanation of what the Commission proposed to do. He said:

One plan [to meet the insanity defense problem] . . . is to provide that where this defense is interposed the question of defendant's sanity shall be tried separately from and subsequently to the issue as to whether he committed the acts charged.¹²

This statement indicates that the Commission thought one of two things about the relation of insanity to criminality. First, the Commission could have thought that the issue of criminal intent and the issue of insanity, though they both relate to the defendant's mental state, involve entirely separate aspects of the defendant's mental condition. The validity of this supposition is, in the first place, a medical question. If it is impossible to separate intent and insanity in any meaningful medical way, it would be manifestly impossible to separate them in any meaningful legal way. The validity of the supposition depends, in the second place, upon a legal question, namely, what is the criminal intent required for a particular crime. The medical phase of the question need not be discussed here; it is necessary only to note that the Commission made no apparent effort to consider the then existing medical knowledge on the subject. As to the legal question, the definition of criminal intent, the Commission did not explore this problem either.

An extraordinary inversion of the usual roles of the prosecution and the defense results if the trial court rejects a guilty plea and then receives evidence bearing on the accused's mental condition as of the date of the offense. The defense insists in such circumstances that the accused was sane at the time of the offense, and that he is guilty; the prosecution, in a reversal of its customary position, undertakes to show that the accused was of unsound mind, that the crime was the product of a mental disease, and that the defendant is not guilty by reason of insanity.

¹² *The Reform of Criminal Procedure*, 1 CAL. S.B.J. 103, 104 (1926). (Emphasis added.) This notion is revealed even more clearly in Tuller, *California's New Code of Criminal Procedure*, 2 CAL. S.B.J. 4, 19 (1927):

When such plea is made the defendant is first tried solely upon the question whether he committed the *act* charged. In this trial no issue of insanity is permitted . . . If . . . the jury finds he did commit the *act*, then the issue whether he was sane at the time of the *act* is immediately tried as a single and independent issue. (Emphasis added.)

The Commission's supposition that "guilt" and "act" mean the same thing is further evidenced by the way § 1016 and § 1026 deal with the effect of a plea of not guilty by reason of insanity. These sections on their face imply that such a plea, without a plea of not guilty, is an admission of guilt—the "commission" of the "offense." Yet the plea is nominally and logically no such thing: nominally, because the plea denies guilt; logically, because guilt involves both the act *and* intent, and insanity would negative intent.

These provisions of § 1016 and § 1026 proved troublesome in *People v. Wells*, 33 Cal. 2d 330, 347, 202 P.2d 53 (1949), discussed in the text following note 42 *infra*.

The second supposition upon which the Commission could have based its position is that the proof of crime involves only the issue of the defendant's manifested conduct—his "act"—and not the issue of his intent. This, of course, is a question of law alone. Obviously, the legal answer is that proof of crime generally—and almost always in criminal cases where the defense of insanity is made—involves issues of the defendant's state of mind.¹³ Nowhere is this more true than in the distinctions between the various kinds of homicide, and the plea of insanity apparently is raised in a higher percentage of homicide cases than in any other type of criminal prosecution.¹⁴ Yet the strange truth seems to be that the Commission failed to consider the vital problem of intent in dealing with the relation between criminal liability and insanity. From this failure have stemmed most of the subsequent problems in administering California's separate trial provision.

Whatever the bases of its decision, the Commission made two recommendations of significance for our present purposes. The first, which related to pleading, required that a defendant who wished to rely on a claim of insanity must so plead.¹⁵ The second required that the issue of insanity, when pleaded, must be tried separately from the issue of whether the defendant is "guilty."¹⁶ It should be noted that the problem of pleading is quite different from the problem of separate trial. Manifestly, the law could require that the defense of insanity be specially pleaded and still provide that it be tried along with the other issues in the case. It should also be borne in mind that the problem of pleading is different from the problem of proof. It would be easy to provide that the defendant must plead insanity, but that the prosecution must overcome that defense by persuading the jury of defendant's sanity.¹⁷ As formulated by the Com-

¹³ CAL. PEN. CODE § 20: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

The same notion is contained in the common-law maxim that there must be *mens rea* in order that the act be criminal. There are important exceptions to the generalization. Principal among the exceptions are the "public welfare crimes," such as short-weight selling, and crimes consisting of violation of safety rules, such as vehicle code violations and industrial safety laws. But even when these exceptions are acknowledged, the generalization may stand.

¹⁴ See, e.g., STATE OF CALIF., BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, CRIME IN CALIFORNIA—1959, p.72, table 27, p.75, table 29.

¹⁵ See CAL. PEN. CODE § 1016.

¹⁶ See CAL. PEN. CODE § 1026.

¹⁷ The obligation of the prosecution may be to persuade the jury by a preponderance of the evidence, or it may be to persuade the jury beyond a reasonable doubt, depending on the jurisdiction involved. In California and some other jurisdictions the burden of proof of insanity rests on the defendant. Generally, the defendant discharges this burden of proof by a preponderance of the evidence, though in Oregon he has the burden of establishing his insanity beyond a reasonable doubt. See *Leland v. Oregon*, 343 U.S. 790 (1952); *WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE* 241 (1954).

It is beyond the scope of this study to consider the anomalies of the California rule on the

mission, however, the separate plea was designed primarily to effectuate the separate trial requirement. Certain other statutory changes were adopted to carry out the Commission's proposal, but these are largely formal in character.¹⁸

No substantial changes have been made in the bifurcated trial procedure since 1927.¹⁹ The problem of the separate trial of the insanity issue therefore involves the application of Penal Code sections 1016 and 1026 in the subsequent years. We now turn to the main features of that development. The cases concern themselves primarily with the problem of deciding whether, and in what circumstances, the defendant may adduce evidence of his mental condition in the course of the trial of his guilt. There are, of course, subsidiary questions,²⁰ some of which will be touched on below. Because the line of development was sharply broken by *People*

burden of proof of insanity. The confusion stems from the impossibility of adhering simultaneously to the following propositions: (1) Insanity negatives guilt; (2) the prosecution has the burden of proving guilt; (3) the defendant has the burden of proving insanity. The courts' efforts to reconcile the inconsistency result in bewildering opinions. See, e.g., *People v. Hickman*, 204 Cal. 470, 268 Pac. 909 (1928); *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (1914); *People v. Bradshaw*, 5 Cal. App. 2d 528, 43 P.2d 317 (1935). See the criticism in Shepherd, *Not Guilty by Reason of Insanity*, 2 So. CAL. L. REV. 53, 56-59 (1928), and Note, 21 CALIF. L. REV. 65 (1932). The separate trial provision, by making it seem that guilt and insanity are separate issues, makes it easier to ignore the inconsistency. See, e.g., *People v. Harmon*, 110 Cal. App. 2d 545, 243 P.2d 15 (1952).

¹⁸ The other changes made in 1927 included the following: (1) An amendment to Penal Code § 1017 setting forth the form of plea to be used in claiming insanity; (2) an amendment to Penal Code § 1020, prohibiting proof of insanity under a plea of not guilty; (3) addition of Penal Code § 1026a, providing the mechanics for releasing defendants who were found insane and sent to a mental hospital in consequence. A subsequent amendment to § 1026a is not relevant here.

¹⁹ In 1929 Penal Code § 1027 was added, requiring in cases where insanity is pleaded that defendants be examined by at least two court-appointed alienists, who might then be called as witnesses by either side or by the court. The constitutionality of this provision has never been settled, *People v. French*, 12 Cal. 2d 720, 769, 87 P.2d 1014, 1039 (1939), but is irrelevant to the problem of separate trial, though it is tied in with the special plea of insanity. In 1949, an aesthetic change was made in Penal Code § 1041 to point out that an issue of fact arose on a plea of insanity.

In 1957, the legislature added Penal Code § 190.1, providing for a special jury hearing on the penalty to be imposed in capital cases. As then enacted, it provided for trial first of the issue of guilt, then penalty, then (when in issue) sanity. This illogical and unjust sequence was reshuffled by a 1959 amendment, so that the order of trial is now guilt, sanity (when in issue), and then penalty.

While none of these provisions is directly involved in the separate trial problem, all of them should be remembered in drafting any amendatory legislation.

²⁰ In Comment, *Restatement of the Law of Insanity as a Defense in the Criminal Law of California*, 27 So. CAL. L. REV. 181 (1954), the student author has organized into convenient form what appears to be a complete collection of the significant California cases on various aspects of the insanity defense. Analysis of the central problems is beyond the author's purpose and hence is undeveloped. However, the discussion of the mechanics of raising and trying the insanity defense is adequate for the period up to the *Wells* decision. The author does not seem to have appreciated the impact of the *Wells* decision. See text following note 42 *infra*.

v. Wells,²¹ decided in 1949, that case is a natural dividing point in the history of the separate trial procedure.

II

APPLICATION OF THE SEPARATE TRIAL PROVISION PRIOR TO *People v. Wells*

The draftsmanship of the 1927 legislation was clear enough. Indeed, a summary of the rules made shortly after the separate trial provisions were enacted remained accurate for the next twenty years:

A new plea of "not guilty by reason of insanity" was created. The existing pleas of guilty, not guilty, former judgment of conviction or acquittal, and once in jeopardy were retained. A defendant, not pleading guilty, could enter one or more of the other pleas; but if he did not plead not guilty by reason of insanity, he was conclusively presumed to be sane at the time of the commission of the offense charged. If he pleaded not guilty by reason of insanity without also pleading not guilty, he thereby admitted the commission of the offense charged. If he pleaded not guilty by reason of insanity and joined with it another plea or pleas, he was first to be tried as if he had entered the other plea or pleas only, and, for the purpose of such hearing or hearings, was conclusively presumed to be sane. If the jury found the defendant guilty upon such hearing, or in the event that he entered only the one plea of not guilty by reason of insanity, the sole question of whether the defendant was insane or sane at the time of the commission of the offense was then to be tried. In the case of a prior plea, he could be tried either by the same or another jury in the discretion of the trial court.²²

Immediately after the enactment of the new system, a number of challenges were hurled at it. Although all of them were rejected, the reasoning by which they were disposed of has continuing importance. The leading cases were *People v. Leong Fook*²³ and *People v. Troche*.²⁴

In the *Troche* case the defendant was charged with first degree murder. He pleaded not guilty and not guilty by reason of insanity. At the trial of the issue of guilt, held first as provided by the statute, he sought to introduce evidence showing that his state of mind was such that he was incapable of premeditation and hence was guilty at most of second degree murder.²⁵ This evidence was excluded. The jury found him guilty of first

²¹ 33 Cal. 2d 330, 202 P.2d 53 (1949).

²² See Shepherd, *The Plea of Insanity Under the 1927 Amendments to the California Penal Code*, 3 So. CAL. L. REV. 1 (1929).

²³ 206 Cal. 64, 273 Pac. 779 (1928).

²⁴ 206 Cal. 35, 273 Pac. 767 (1928).

²⁵ This claim was referred to as a claim of "partial insanity." *Id.* at 46, 273 Pac. at 772. The term "partial insanity" has been generally used since. See *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CALIF. L. REV. 625 (1946); WEIHOFEN, MENTAL DISORDER AS A

degree murder without recommendation, then heard the issue of his insanity and found him sane. On appeal, he made three contentions: (1) The court deprived him of due process by excluding proof of his mental state in the trial of his guilt; (2) the court deprived him of his right of trial by jury by withholding the issue of sanity from the jury until after they had found him guilty; and (3) properly construed, the separate trial provisions did not preclude introduction of evidence designed to negative premeditation, since that was an element of the crime charged. All three contentions were rejected over a strong dissent.

The due process claim was rejected with the simple statement that "the words 'due process of law' merely mean law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights."²⁶ It is evident that the court was treating due process as requiring nothing more than that a trial be conducted according to prescribed rules of procedure. This was probably an inadequate answer to a due process claim even then, and it certainly would no longer be a sufficient response to a well framed due process objection.²⁷

The jury trial claim was rejected by saying that insanity "is, and of necessity must be, a plea of confession and avoidance" and hence the procedure involved no more than a sequential submission of independent issues to the jury, no different from the separate submission of a plea of prior acquittal or double jeopardy.²⁸ In developing this idea, the court said that "insanity . . . is either a complete defense or none at all, and . . . there is no degree of insanity sufficient to acquit of murder but not of manslaughter."²⁹ Finally, the court rejected the claim that the statute should be construed to allow introduction of the proof defendant offered.

CRIMINAL DEFENSE 174-75 (1954); cf. Hacker & Frym, *The Legal Concept of Insanity and the Treatment of Criminal Impulses*, 37 CALIF. L. REV. 575 (1949). It may be asked, however, whether the term served rather to confuse the problem than to clarify it. Precisely the same claim is treated in *People v. Wells* and cases following it as an offer of proof tending to show that defendant lacked the specific intent required for the crime of which he is charged. See text following note 42 *infra*.

²⁶ *People v. Troche*, 206 Cal. 35, 42, 273 Pac. 767, 770 (1928).

²⁷ The unelaborated dismissal of the due process contention, in the language quoted in the text at note 26 *supra*, hardly did justice to the precedents then at hand. See *Mobile R.R. v. Turnipseed*, 219 U.S. 35 (1910) (cited by Preston, J., dissenting in *People v. Troche*, *supra* note 26), and, even more important, *Bailey v. Alabama*, 219 U.S. 219 (1911). The *Bailey* case invalidated a state statute providing that if a person enters into a contract for services and thereafter fails to perform it, his subsequent failure is *prima facie* evidence that he had an intent to defraud his employer at the time he entered the contract.

²⁸ *People v. Troche*, 206 Cal. 35, 44, 273 Pac. 767, 771 (1928).

²⁹ *Id.* at 47, 273 Pac. at 772. This rule was adhered to in name, but departed from in fact in the *Wells* case.

In the light of the legislative history, this interpretation of the statute seems proper.³⁰

In reaching its decision, the court did not deal with the dissenter's contention—apparently also advanced by the appellant—that first degree murder required a finding of premeditation and that a finding of premeditation could only be based on the assumption that the defendant was sane enough to premeditate. Mr. Justice Preston, dissenting, crystallized his objection to the bifurcated trial and the resulting exclusion of evidence of mental condition at the trial of the guilt issue by saying: "These provisions . . . undertake to subdivide an indivisible integer, and therein lies their chief infirmity. In other words, the plea of not guilty necessarily includes within it the element of insanity."³¹ Justice Preston pointed to Penal Code section 21³² in support of his contention, which he developed at some length. But notwithstanding this protest, the court failed to address itself to the crucial problem thus presented.

On the same day that it handed down the *Troche* decision, the court decided *People v. Leong Fook*.³³ In this case also the defendant was found guilty of first degree murder following a rejection of tendered proof of mental condition showing inability to form the requisite intent. Defendant urged much the same arguments as had been made in *Troche*, but added the contention that the bifurcated trial subjected him to double jeopardy. Again, the court treated insanity as an affirmative defense. It evaded the problem of premeditation by saying that "presentation and proof of insanity . . . do not in any degree diminish the quality of the *homicide* as an unlawful act."³⁴

³⁰ But see *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949). Compare note 12 *supra*. The interpretation in *Troche* seems the more tenable, not only because it is a more faithful adherence to the draftsmen's intent, but because the court was construing a contemporaneous enactment. See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5108 (3d ed. 1943); cf. *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal.2d 753, 151 P.2d 233 (1944).

³¹ *People v. Troche*, 206 Cal. 35, 53, 273 Pac. 767, 774 (1928).

³² CAL. PEN. CODE § 21: "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

³³ 206 Cal. 64, 273 Pac. 779 (1928).

³⁴ *Id.* at 71, 273 Pac. at 782. (Emphasis added.) See also *id.* at 75, 273 Pac. at 784.

The court thus failed to discuss or even acknowledge the fact that *homicide* includes not only both first and second degree murder, but also manslaughter and noncriminal killing as well. To imply that each of these varieties of homicide has the same "quality" as an "unlawful act" is of course absurd. Yet the court could not avoid the force of the defendant's contention except by resting on that implied premise. Throughout the opinion the court refers only to "homicide," an evasion that must have been exasperating to counsel resting his whole argument on the differences between the various kinds of homicide. For a further criticism see Shepherd, *The Plea of Insanity under the 1927 Amendments to the California Penal Code*, 3 So. CAL. L. REV. 1, 5-7 (1929).

The double jeopardy claim was rejected in *Leong Fook*³⁵ on the basis of an earlier case, *People v. Coen*,³⁶ which held that the second phase of the trial, far from subjecting defendant to double jeopardy, gave defendant a chance "to relieve himself of the state of jeopardy, in which he had been . . . placed [by the guilty finding on the first phase of trial]."³⁷ It might also be noted that in *Coen* the defendant argued that he should have been allowed to have a new jury to try the insanity issue, on the ground that the first trial had prejudiced the jury against him. This was rejected on the theory, which reappears in the *Leong Fook* and *Troche* cases, that the two proceedings were merely phases of a "single trial."

The contentions advanced in these cases are set out in some detail because the answers given to them remained, until the *Wells* decision, the basic rules governing the trial of the insanity defense. In the period from 1928 to 1949, the court consistently refused to allow introduction of evidence of mental condition in the first phase of the bifurcated trial. With equal consistency it adhered to the "single trial" analysis and the underlying premise that the separate trial provisions involved nothing more than procedural form.

In the period from the *Troche* and *Leong Fook* decisions to the *Wells* decision in 1949, only one line of cases seems worth noting. In these decisions, the "single trial" analysis withstood seemingly overwhelming attacks. In *People v. Farolan*,³⁸ the jury that found the defendant guilty of first degree murder without recommendation then deadlocked on the issue of insanity. The trial court impaneled a second jury to retry the insanity issue alone, and that jury found defendant sane. The conviction was affirmed. The same thing happened in an assault case, *People v. Messerly*,³⁹ where the appellate court explained its decision by saying that "when there has been a failure of trial by disagreement of the jury, the status is the same as if there had been no trial."⁴⁰ In *People v. Eggers*,⁴¹ the jury found defendant guilty of first degree murder. At this point the foreman told the judge that if the sanity issue were tried to the jury, the jurors would be deadlocked. The trial judge expressed the opinion that the jury, despite prior explicit instructions to the contrary, must have considered the insanity issue during their deliberations on the guilt issue, an inference that is not unreasonable in light of the foreman's remarks. Over defendant's

³⁵ *People v. Leong Fook*, 206 Cal. 64, 77, 273 Pac. 779, 785 (1928).

³⁶ 205 Cal. 596, 271 Pac. 1074 (1928). See Comment, 19 CALIF. L. REV. 174, 177 (1931).

³⁷ *People v. Coen*, 205 Cal. 596, 613, 271 Pac. 1074, 1081 (1928).

³⁸ 214 Cal. 396, 5 P.2d 893 (1932). The appeal was neither briefed nor argued by the defendant.

³⁹ 46 Cal. App. 2d 718, 116 P.2d 781 (1941).

⁴⁰ *Id.* at 721, 116 P.2d at 783.

⁴¹ 30 Cal. 2d 676, 185 P.2d 1 (1947).

objection, the trial judge discharged the first jury and impaneled a second one, which then found defendant sane. The supreme court affirmed on the strength of the *Messerly* decision and in reliance on the presumption that the first jury performed its duty; hence it did not discuss the sanity issue.

The *Eggers* decision is explicable only if preternatural probative force is given to legal fiction. The legal presumption that the jury did their duty, useful in its place, is hardly sufficient to overcome the plain implications of the jury foreman's statement. And the legal concept that mistrial is no trial, also useful in its place, is a fanciful basis on which to say that only one trial took place when unmistakably there were twenty-four jurors participating in the final decision.

So much, then, for the main outlines of the law prior to the *Wells* decision. As we shall see, that case worked a material change in the law, the full implications of which may not be grasped even now.

III

People v. Wells

It is difficult to read the cases decided in the period prior to *People v. Wells*⁴² without succumbing to doubts about the justice and analytical soundness of their results. This is particularly true where, as in *Troche*, the defendant endeavored to show that he did not—because he could not—premeditate in the manner required for first degree murder.⁴³ It seems reasonable to suppose that the supreme court was itself subject to these doubts. In any event, *Wells* appears to be an attempt to ameliorate the consequences of the separate trial procedure without dismantling it or attacking its logical infirmities.⁴⁴ In the course of this attempt, the court set up rules that have implications regarding not only the procedure by which the defendant's insanity is tried, but also the test of insanity itself. Indeed, it seems clear that the result of the *Wells* decision was the adoption of a test of insanity supplementary to the historic *M'Naghten* rule.⁴⁵

⁴² 33 Cal. 2d 330, 202 P.2d 53 (1949).

⁴³ One of the most striking illustrations of the consequences of rigorous application of the bifurcated trial provisions is found in *People v. Coleman*, 20 Cal. 2d 399, 126 P.2d 349 (1942), *cert. denied*, 320 U.S. 767 (1943). In that case, defendant was sentenced to death for the first degree murder of his wife. The trial judge had ruled, and was affirmed in his decision, that defendant could not show on the trial of his plea of not guilty that he was a chronic alcoholic suffering from delirium tremens.

⁴⁴ In the *Wells* case, the court made no effort to justify or to restate the grounds of decision in the *Troche* and *Leong Fook* cases. It simply cited these and subsequent decisions as having, for better or worse, closed all constitutional argument. See *People v. Wells*, 33 Cal. 2d 330, 352, 202 P.2d 53, 66-67 (1949). See the similar refusal in *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911 (1953).

⁴⁵ That rule is that defendant is incapable of committing crime by reason of "insanity" if "at the time the accused committed the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that

In *Wells*, the defendant, an inmate of Folsom State Prison, was charged with violation of Penal Code section 4500, which makes it a capital offense for a life-term prisoner to commit an assault "with malice aforethought." In the trial of defendant's guilt, he offered the testimony of the prison psychiatrist to show that his "threshold of fear" was abnormally low and that as a result he reacted more violently than normal persons to fear-creating circumstances. The theory was that if defendant thought himself in danger, he could have believed he acted in self-defense, which would preclude an intent to commit unjustified, *i.e.*, malicious, assault. The trial judge rejected this offer of proof, apparently relying on the separate trial provision and the rule that "partial insanity" is no defense to crime in California. In so ruling, the trial judge seems to have correctly applied the law as it then stood. Defendant was convicted and appealed.

The supreme court affirmed, finding that defendant's own testimony showed clearly that he had the requisite intent and hence that the rejection of the proof was not prejudicial. But with considerable ingenuity, the court went on to hold that the proof was admissible.

The court first noted that to establish the crime charged it was necessary to prove the "specific intent" embraced in the term "malice aforethought." It then pointed out that the absence of this intent would not necessarily render defendant innocent of *any* criminal conduct, but would render him innocent of the particular kind of aggravated assault with which he was charged. To show such absence, the court said, the proof was relevant and should have been admitted. Indeed, the court strongly implied that refusal to admit evidence for this purpose would be a denial of due process.⁴⁶

he did not know that he was doing what was wrong." *People v. Nash*, 52 Cal.2d 36, 39 n.1, 338 P.2d 416, 417 n.1 (1959). For variations in the formulation, see Comment, 27 So. CAL. L. REV. 181 (1954).

⁴⁶ 33 Cal. 2d 330, 346, 351, 355, 202 P.2d 53, 63, 66, 68 (1949). The *Wells* case is comprehensively discussed in Diamond, *With Malice Aforethought*, 2 ARCHIVES OF CRIMINAL PSYCHO-DYNAMICS 1, 14 (1957).

As an additional ground, the court relied on the rule obtaining in the analogous situation that arises when a defendant seeks to introduce evidence that he was intoxicated. It is well settled that voluntary intoxication is not a defense to crime. However, as provided in Penal Code § 22, "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular . . . crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the . . . intent with which he committed the act." Under this section, the courts have regularly admitted proof of intoxication to diminish the degree of culpability in a homicide case. *People v. Baker*, 42 Cal.2d 550, 268 P.2d 705 (1954); *People v. Smith*, 14 Cal.2d 541, 95 P.2d 453 (1939).

It should also be remembered that Penal Code § 26(5) provides that a defendant who is "unconscious," like a defendant who is "insane," is incapable of committing crime. In *People v. Cox*, 67 Cal. App.2d 166, 153 P.2d 362 (1944), it was held that the defendant's evidence of unconsciousness from a blow on his head by his assailant entitled him to an instruction on the subject.

The reasoning thus far seems uncomplicated. But difficulties arise when we recall the provisions of Penal Code sections 1016 and 1026. These sections, of course, expressly prohibit proof of "insanity" in the course of trying defendant's "guilt." How can these sections be reconciled with the admission of evidence regarding defendant's mental condition? One way of allowing the evidence to be admitted during the trial of defendant's guilt would have been to hold the separate trial provision constitutionally invalid as a denial of due process. This, however, would have required overruling a line of decisions twenty years old, a step the court was apparently disinclined to take.

The only alternative open to the court was to say that the defendant in the *Wells* case was trying to prove something other than "insanity." The court could say that the "insanity" referred to in the separate trial procedure was that condition of mind defined in *M'Naghten's Case*,⁴⁷ and that the separate trial procedure prohibited proof of mental condition coming within the *M'Naghten* definition, but did not prohibit proof of mental conditions falling outside the *M'Naghten* test. The court could then hold that there could be mental conditions that rendered defendant incapable of committing the crime charged, but that fell outside the *M'Naghten* test. From this it could conclude that proof at the first trial of this other sort of mental condition was not prevented by the separate trial provision. By this means, the proof could be admitted and the statutory separate trial of "insanity" could also be sustained. And this is precisely what the court did.⁴⁸

The second definition of exculpating mental condition is very simple: Was defendant's mental condition such that he did not form the specific intent required for the crime charged? Since the definition has no other name, it will be called the "*Wells* test."

Reaching the result in the *Wells* case required some rather strenuous legal gymnastics. For one thing, it required the court to treat the term "insanity" in the separate trial provisions of Penal Code sections 1016 and 1026 as having a different and narrower meaning than the same term as used in the general provision of section 26 of the Penal Code providing that

⁴⁷ *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

⁴⁸ For a more explicit statement that this was the path of decision, see *People v. Nash*, 52 Cal.2d 36, 48, 338 P.2d 416, 423 (1959): "The issue which the Legislature, by the 1927 enactment, took out of the trial on the general issue was a narrow one—insanity as defined by the *M'Naghten* rule, not all questions of mental disease or disorder."

The same result seems to have been achieved by the American Law Institute. MODEL PENAL CODE § 4.03(1) (Tent. Draft No. 4, 1955) makes insanity (as defined in a way similar to the *M'Naghten* definition) an affirmative defense, while § 4.02 provides that defendant may offer evidence that he did not have the mental state required for the crime charged. The comments on these sections do not explain the relation between these two sections or between the tests of mental condition they involve. It might be added that the Model Penal Code apparently contemplates a single trial of these and all other issues in the case.

"insanity" renders a person incapable of crime.⁴⁹ Moreover, attempting to adhere to the letter of the separate trial provision, the court ignored the reason that prompted its enactment: the desire to separate the issue of guilt from the issue of mental condition.⁵⁰ Finally, the court was required to lay down a rule of evidence of mental condition that seems incapable of predictable administration.⁵¹

The evidence rule is worth brief elaboration, for it was in the formulation of this rule that the court confronted the illogic of its position. It had to say that evidence of mental condition was admissible, but that evidence of "insanity" was not. As an attempted reconciliation of these inconsistent objectives, the court stated the following:

As a general rule, on the not guilty plea, evidence, otherwise competent, tending to show that the defendant, who at this stage is conclusively presumed sane, either *did* or *did not*, in committing the overt act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible. Thus, if the proffered evidence tends to show not merely that he *did* or *did not*, but rather that because of legal insanity he *could* not, entertain the specific intent or other essential mental state, then that evidence is inadmissible under the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity.⁵²

Mr. Justice Carter in his dissenting opinion stated that this distinction is untenable,⁵³ for as a matter of logic, any proof tending to show that a certain mental condition *could* not exist is relevant and should be admissible to show that it *did* not exist. And of course, proof that something could not exist is the best possible evidence that it did not exist. On this issue he stated:

In my opinion [the rule announced by the majority and quoted above] . . . is unsound, wholly impractical to apply and will lead not only to absurd results but will tend to encourage perjury and the juggling of words by

⁴⁹ Had the court not given the term "insanity" two different meanings, it would have been forced to assert the following inconsistent propositions:

- (1) The mental condition rendering a person incapable of committing crime is referred to as "insanity" by Penal Code § 26.
- (2) "Insanity" means the mental condition defined in *M'Naghten's Case*.
- (3) "Insanity" may not be proved under the not guilty plea.
- (4) A mental condition rendering a person incapable of committing crime may be proved under the not guilty plea.

⁵⁰ See text at note 9 *supra*.

⁵¹ It seems anomalous that although in the *Wells* case the court comprehended that, in certain kinds of crime, "guilt" cannot be ascertained apart from "intent"—that in such crimes "overt act" cannot be synonymous with "offense"—nevertheless, at 33 Cal. 2d 347, 202 P.2d 64, in its discussion of § 1016 and § 1026, the court inserts in brackets "overt act" after "offense." See also note 12 *supra*.

⁵² 33 Cal. 2d at 350–51, 202 P.2d at 66.

⁵³ *Id.* at 360, 202 P.2d at 71.

expert witnesses on the question of defendant's mental condition. It is unsound because it violates the fundamental principle that "the greater contains the less." (Civ. Code, § 3536.) If the accused's mentality at the time of the commission of the unlawful act was such that he could not distinguish between right and wrong—had no reasoning capacity at all, he could not have had a specific intent, premeditated or acted maliciously. Thus evidence of that condition would establish a total lack of intent, premeditation or malice—elements, the proof of which, is indispensable to establish guilt. It is strange reasoning to say that you may prove a partial mental quirk or disability to refute the presence of intent but cannot give evidence of a total mental aberration. This is equivalent to saying that blindness in one eye will absolve a person from guilt, but that two sightless eyes will constitute no defense. Is this not a paradoxical absurdity?⁵⁴

To draw a line between evidence of mental condition admissible at the first trial, and that admissible only at the second trial, a line that is logically satisfactory and administratively feasible, is a herculean task.⁵⁵ As a trial judge stated in a letter to the writers: "But even if right, the Wells case is a Pyrrhic victory because it imposes upon both the trial and reviewing courts the impossible task of determining accurately what evidence is and is not admissible."

IV

DEVELOPMENTS SINCE *People v. Wells*

Since 1949, the *Wells* case has represented the controlling law in California. The decision has been applied in a number of cases, none of which, however, has made any serious effort to reconcile the logical and practical difficulties inhering in the rules laid down in *Wells*. Even more confusing is the fact that the decisions continue to state various rules relating to the insanity defense that antedate the *Wells* decision and are inconsistent with it. Thus, it is still said that insanity does not affect the "degree" of crime,⁵⁶ although it is acknowledged elsewhere that the mental condition

⁵⁴ *Ibid.*

⁵⁵ *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954), suggests the difficulty of attempting to maintain the distinction pronounced in the *Wells* case. There the defense proved epilepsy that rendered defendant incapable of forming the intent required for murder and also incapable of knowing the nature and quality of his act, according to the test laid down in *M'Naghten*. It so happened that the issues of guilt and insanity had been consolidated by stipulation, so that the court was not forced to differentiate between the proof admissible to show defendant "did not" commit the crime and that admissible to show he "could not" do so. It is difficult to imagine on what basis the court could have separated the testimony offered in the *Baker* case. See also *People v. Reilly*, 101 Cal. App. 2d 233, 225 P.2d 314 (1950).

⁵⁶ *People v. Rupp*, 41 Cal. 2d 371, 260 P.2d 1 (1953). This statement may be technically accurate, if it is assumed that "insanity" is used to mean the mental condition defined in *M'Naghten*, but not the mental condition in *Wells*. On this assumption, however, the statement seems irrelevant, for it remains true that the *Wells* type of mental condition is provable to reduce the degree of crime.

recognized in the *Wells* case is one of "partial insanity."⁵⁷ A further complexity arises from the concession that the defendant has, as he has always seemed to have had, the burden of proving his "insanity,"⁵⁸ paralleled by the assertion that the defendant need only raise a reasonable doubt about the existence of the *Wells* type of mental condition.⁵⁹

Only two other developments since the *Wells* decision require particular mention. First, in *People v. Webb*⁶⁰ the district court of appeal was confronted with the question whether, in the trial of the guilt issue, the defendant could put in laymen's testimony tending to show his lack of specific intent at the time of the crime. Reasoning that the scope of proof of specific intent should be as broad as proof of "insanity" itself, the court held such testimony admissible. This means that all the sympathy-provoking testimony of defendant's kith and kin, which the separate trial was supposed to keep out of the case, now may come in without obstruction. If any rational prop remained to support the separate trial provision, this decision seemingly removed it.

The other development that should be mentioned is the recommendation of the California Special Crime Study Commission on Criminal Law and Procedure. In their final report in 1949, made public not long after the *Wells* decision, the majority of the Commission said:

The majority members of the Commission recommend that Section 1026 of the Penal Code be amended to retain the provision requiring the specific plea of not guilty by reason of insanity but to provide that, when such plea and the plea of not guilty are both entered, the issues raised by the two pleas be tried simultaneously. . . . It would seem unnecessary to present argument that the mental condition and the capacity of the defendant . . . is often an indispensable factor to be considered by the jury if they are to return a just verdict. . . .

If by authority of [*Wells*] . . . evidence of the mental status or insanity of a defendant is admissible on a not guilty plea, it is only a duplication of time and effort to produce the same evidence on a second trial.⁶¹

The minority members of the Commission recommended that the bifurcated trial be retained, but that the issue of defendant's insanity be tried to the court without a jury.⁶² The minority report takes no account of the constitutional objections that might be leveled against such a procedure, though such objections, to say the least, seem substantial. Furthermore, the minority report seems to suffer from the same misapprehension that at-

⁵⁷ See *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

⁵⁸ *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911 (1953).

⁵⁹ *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

⁶⁰ 143 Cal. App. 2d 402, 300 P.2d 130 (1956).

⁶¹ California Special Crime Study Commission on Criminal Law and Procedure, *Final Report* 116-17 (1949).

⁶² *Id.* at 118.

tended the 1925 Commission, namely, the supposition that guilt can somehow be divorced from the problem of defendant's mental condition.⁶³

Having traced the development of the California law governing the separate trial of the insanity issue, we turn to résumés of the opinions of those who are dealing with the problem of bifurcation "in the field."

V

SUMMARIES OF OPINIONS FROM THE FIELD

In order to gain a broad perspective of the bifurcated trial procedure, it seemed advisable to seek the opinions of California superior court judges, district attorneys, and defendants' lawyers about how the procedure was actually working in practice. Letters were written to a number of representatives of each of these groups, inquiring about the extent of their experience with the separate trial method, their reactions to pertinent case-law developments, the frequency of waiver of jury trial and of use of a different jury at the second trial, and their appraisal from various viewpoints of the desirability of the bifurcation. A number of addressees wrote deliberate and comprehensive replies, and expressly authorized their use for this study.⁶⁴ The following paragraphs summarize the responses to our letters.

A. Summary of Letters From Superior Court Judges Who Generally Favor Abolition of the Separate Trial

These letters range in tone from mild criticism of the separate trial to characterization of it as an "abomination." Several conclude that the separate trial provisions were beneficial and worked well before the decision in *People v. Wells*, but that there is no advantage in the separate trial since the *Wells* case; that the latter gives a defendant "two shots at the same thing"; that substantially the same evidence is now admissible at both trials. The viewpoint is pressed that the *Wells* decision is hard to administer, in that it is difficult to draw the line between evidence admissible and that inadmissible at the first trial. Several expressly concur in the rule of the *Wells* case, but one letter, while agreeing with the court "that evidence

⁶³ *Ibid.*:

[The subject of insanity] is very closely connected with that of homicide—particularly the degrees of and punishment for such offense. . . . These subjects are too complex and technical for any lay jury . . . and . . . should be determined by the court after the jury has passed on the single issue of whether the defendant killed the decedent.

It will be recalled that the 1927 *Report of the Commission for the Reform of Criminal Procedure* also proceeded on the assumption that the issue in a murder case is defendant's "act," ignoring the intent problem. There is no such crime as "homicide"; there are kinds of homicide, differentiated by the defendant's intent at the time of the killing.

⁶⁴ The originals of these replies are on file in the office of the California Law Revision Commission at Stanford, California. Copies are on file in the McEnerney Law Library of the University of California School of Law, Berkeley.

bearing on one of the necessary factual elements of a crime, viz. intent, could not be excluded" continues, "it is also my opinion that the logic of the majority discussion falls apart beginning at [33 Cal. 2d] 352." Another suggests that Mr. Justice Carter's dissent in *Wells* might have represented the better viewpoint. One notes that a defendant may be handicapped by financial incapacity to procure psychiatric testimony for two hearings.

B. Summary of Letters From Superior Court Judges Who Generally Favor Retention of the Separate Trial

These letters generally advance as reasons for preferring the separate trial system grounds similar to those originally advanced by the sponsors of that system, namely, that it inhibits appeals to the sympathy of the jury; that it is less confusing to a jury than the unitary trial; that the unitary trial often would mean a "Roman holiday"; that the separate trial permits a better evaluation of the testimony; and that it promotes simplicity and true understanding of the issues. However, some take the position that part of the good of the separate trial system is attenuated by the *Wells* decision; while others argue that the decision has actually improved the system by remedying its defects. The expressions of preference for the separate trial are less pronounced in some than in others. One judge states "In my overall experience I do not see any great drawback in the separate trial method now being used in California. I believe that everything can be accomplished which is desired by either method. I also feel that if a single trial system is to be adopted care should be taken in requiring a special finding by the jury on the issue of insanity." The writer of these views earlier notes "My experience would indicate that the problem is not so much the result of the procedural method adopted (separate or single trial) as it is the result of the definitions and concepts sought to be applied."

C. Summary of Letters From District Attorneys

The viewpoints of district attorneys range from the idea that the separate trial system is better because it is less complicated, especially in the matter of instructing the jury, to the notion that the unitary trial is better because the issues are essentially interrelated and separation is cumbersome. Several district attorneys conclude that much of the advantage of the separate trial is gone as a result of the *Wells* case; that its principle is hard to administer. One district attorney favors retention of the separate trial on the ground that it makes more feasible the presumption of sanity, the notion being that application of that presumption in a unitary trial, along with the presumption of innocence, is awkward and difficult. Another criticizes the present system because the defendant gets the advantages of both systems: he has two cracks at his contention. One argues that in a bifurcated system it might be better to have the sanity hearing first: "It

seems illogical that a defendant should be required to stand trial if he is, in fact, insane. On the other hand, where his sanity has been settled, there is then no reason why all of the confusing collateral psychiatric 'evidence' should be allowed into a trial on the issues where it serves, and in many cases is meant to serve, to confuse the jury." One thinks that whether the trial is unified or separate is not important; he is, however, critical of the *Wells* decision and its progeny as unduly favorable to the defendant.

D. Summary of Letters From Defendants' Attorneys

One vigorously criticizes the separate trial system as philosophically unsound for crimes involving specific intent.

There is neither logic nor reason in the statement that a defendant who has pled not guilty by reason of insanity must be "conclusively presumed sane" on the trial of the not guilty issue if the offense charged is a specific intent crime. We labored under the philosophical monstrosity until the date of *People v. Wells*. . . . An enlightened court realized that due process of law required an inquiry into the mental condition of a defendant if the state sought to prove that he was guilty of a specific intent crime. By laboring under the errors of the past, the court failed to take the full step of declaring the procedure unconstitutional. The court quibbled.

Another's criticism of the separate trial system is essentially that, since *People v. Wells*, the second trial is really redundant. A public defender, however, though agreeing with the *Wells* decision, urges retention of the separate trial, pointing out: "If a motion is made under Section 1368 as to the question of the insanity of the defendant, we rely almost entirely on the reports of the doctors, and if the doctors say he is insane, we waive a jury trial. If the doctors say he is sane, we do not demand a jury trial as to the question of sanity, but accept their findings."⁶⁵

VI

SEPARATE TRIAL PROCEDURES IN OTHER STATES

Apparently only two other states, Colorado and Texas, still have a procedure for separately trying the insanity issue. Louisiana was the most recent to abandon bifurcation; a few other states used the procedure several decades ago, but have long since abandoned it. The changes in psychiatric knowledge that have taken place in the last twenty or thirty years probably make this earlier experience obsolete and unprofitable of exploration.⁶⁶

⁶⁵ For a skeptical attitude respecting the wisdom of such ready surrender to the *in camera* determination by the experts of the obligation of assessing responsibility, see LOUISELL & WILLIAMS, *THE PARENCHYMA OF LAW* 405-07 (1960); Louisell, *Increasing Importance of Psychology to Law*, 11 *Val. L. Weekly* No. 6, Nov. 6, 1958, pp. 1-2.

⁶⁶ Wisconsin had a procedure calling for trial of the issue of insanity prior to trial of the issue of guilt, but repealed it many years ago. See *People v. Troche*, 206 Cal. 35, 56, 273 Pac.

Of the other states having special provisions for the trial of the issue of insanity, perhaps the most interesting is Colorado. This is because the Colorado practice, until recent years, not only was the same as the California practice, but anticipated the *Wells* decision.

In 1927 Colorado adopted separate trial provisions that were substantially identical with Penal Code sections 1016 and 1026. Indeed, the inference is very strong that the Colorado provisions were taken from those of California. Not long after the adoption of the new procedure, its constitutional validity was challenged on the same grounds urged in the *Troche* and *Leong Fook* cases. In *Ingles v. People*⁶⁷ these objections were overruled and the statute sustained. Interestingly, however, the court rejected the *Troche* rule that all evidence of mental condition was inadmissible at the trial of the guilt issue. Instead, it adopted the approach that ultimately was accepted in the *Wells* case; the defendant was entitled to introduce evidence of his mental condition tending to show he lacked the requisite intent to commit the crime.

The law of Colorado remained substantially unchanged until 1955. It is unnecessary to review the cases decided between the *Ingles* decision and the 1955 legislation, except to report that as of 1955 "every case presented to [the Colorado Supreme] Court . . . involving procedures under this statute since its adoption, has been reversed for one reason or another."⁶⁸ In 1955, radical changes were made in the statutory plan.⁶⁹ These changes are summarized as follows:

The 1955 legislature changed the prior procedure substantially. Where both not guilty and insanity pleas are entered, formerly there had to be two separate trials, though not necessarily before different juries. The new law provides that the defendant or the court may demand a separate trial on the issue of insanity, but a separate trial is not automatic. Where there are two trials, the new procedure provides that the insanity trial is held first, the trial on the other issues second; this is just the opposite of the prior procedure. The new law provides for trial before a new jury when trial on the insanity issue is followed by a separate trial on the not guilty issue, whereas the former law left the matter of the same or a new jury to the discretion of the court. The new law does not expressly recognize the situation of a sole plea of not guilty by reason of insanity, as did the former law; doubtless, however, such a plea may still be made.

The new law, unlike the old, expressly recognizes that mental derangement not fulfilling the requirements for legal insanity may have a bearing on defendant's capacity to entertain the specific intent necessary for cer-

767, 776 (1928) (dissenting opinion). A number of states have required that a defendant wishing to rely on the defense of insanity must specially plead that fact. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 357-59 (1954).

⁶⁷ 92 Colo. 518, 22 P.2d 1109 (1933).

⁶⁸ *Leick v. People*, 131 Colo. 353, 361, 281 P.2d 806, 810 (1955).

⁶⁹ See COLO. REV. STAT. ANN. §§ 39-8-1 to 39-8-4 (Perm. Supp. 1960).

tain crimes. [This has long been Colorado law, even though not statutory law. *Ingles v. People* . . .] The 1955 statute properly provides that the defendant may advance such a defense under a plea of not guilty and need not plead not guilty by reason of insanity.⁷⁰

In 1957 the Colorado legislature repealed the defendant's right to demand a separate trial on the issue of insanity.⁷¹ Thus in Colorado today, when a defendant pleads not guilty by reason of insanity, and not guilty, the case in the discretion of the court may be either set for trial on the insanity issue alone, or may be set for one trial upon all issues raised by all pleas entered. If the trials are separate, the insanity trial comes first. The statute, although precluding the defense of insanity by one who does not plead it, nevertheless explicitly provides "that evidence of mental condition may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent essential to constitute a crime."⁷² In *Leick v. People*,⁷³ the Colorado procedure survived a constitutional challenge that defendant's jury trial was impaired by a separate trial held by order of the court. This contention was rejected on the basis of the "single trial" analysis, in spite of the statutory provision requiring that two juries be used. The decision seems no sounder than the similar California decisions on this point.⁷⁴

The Texas practice is, as one might expect, unique. Texas law, in accord with the general rule, provides that a defendant who is insane at the time of trial should not stand trial until he has recovered from his mental illness. The statutory provision to this effect was interpreted by the courts to require that whenever a defendant claimed present insanity rendering him incapable of defending himself, there should be a separate and preliminary jury trial of that issue.⁷⁵ If the defendant were found insane, of course, he would not stand trial; if he were found sane, the trial of the principal issue would proceed forthwith.

Apparently it was found that the issue of defendant's present sanity was usually intertwined with the issue of his sanity at the time of the crime. In any case, in 1937, the Texas Legislature enacted a statute providing

⁷⁰ Scott, *Highlights of the 1955 Legislative Session—Criminal Law and Procedure*, 28 ROCKY MT. L. REV. 69, 70-71 (1955).

⁷¹ Compare Colo. Laws 1957 ch. 119, p. 325, with Colo. Laws 1955 ch. 118, p. 276. See *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959). Amendments effected by Colo. Laws 1961 ch. 102, p. 314 appear irrelevant for our purposes.

⁷² COLO. REV. STAT. ANN. 39-8-1 (Perm. Supp. 1960); see *Early v. People*, 142 Colo. 462, 469, 352 P.2d 112, 116 (1960).

⁷³ 136 Colo. 535, 322 P.2d 674 (1958).

⁷⁴ See text at notes 38-41 *supra*.

⁷⁵ The statutory structure and its history are outlined in *Pena v. State*, 320 S.W.2d 355 (Tex. Cr. 1959).

that the jury trying the preliminary issue of defendant's present sanity might also render a verdict on his sanity at the time of the crime. With modifications, that is still the law. But the Texas Legislature did not repeal article 521 of the Texas Code of Criminal Procedure, which expressly provides that evidence of the defendant's insanity at the time of the crime is admissible under a plea of "not guilty." The result is that the issue of defendant's sanity at the time of the crime may be passed on by two successive juries. If *either* jury finds defendant insane at the time of the crime, then he is not guilty. If the jury trying the preliminary issue of defendant's present insanity finds him presently sane and also finds that he was sane at the time of the crime, the latter finding is not binding on defendant in the trial of his guilt. It is, however, admissible in the second trial as evidence of defendant's guilt at the time of the crime.⁷⁶

The way this strange system works is illustrated by *Pena v. State*.⁷⁷ Defendant was charged with murder and pleaded present insanity rendering him incapable of making his defense. This issue was tried to a jury, which found defendant presently sane and also sane at the time of the crime. A second jury was thereafter impaneled, and the trial of defendant's plea of "not guilty" proceeded. In this second trial, the state introduced the jury verdict in the first trial in support of its claim that defendant was sane at the time of the crime. Despite some evidence by defendant supporting his claim of insanity at the time of the crime, the second jury—like the first—found him sane, and also found him guilty.

It is evident that the Texas practice gives the defendant a distinct advantage. In the first trial, he has everything to gain and relatively little to lose. The prosecution, however, must convince two juries that defendant was sane at the time of the crime. In addition the double trial seemingly results in a substantial duplication of effort, since the evidence admissible in the first trial appears to include most of the evidence admissible in the second trial. Judged by any criteria of orderly judicial administration, the Texas practice seems to have little to recommend it.

Louisiana is apparently the only state during recent years that has had a separate trial procedure and subsequently has abandoned it.⁷⁸ The his-

⁷⁶ See *Freeman v. State*, 317 S.W.2d 726 (Tex. Cr. 1958); *Parsons v. State*, 271 S.W.2d 643 (Tex. Cr. 1954). For criticisms of the Texas procedure see Stout, *Criminal Procedure and Crime Prevention*, 38 TEXAS L. REV. 821, 828 (1960); Woodley, *Insanity as a Bar to Criminal Prosecution*, 3 TEXAS L.J. 204, 213 (1958).

⁷⁷ 320 S.W.2d 355 (Tex. Cr. 1959).

⁷⁸ In WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 359 (1954), it is said that there is a separate trial of the insanity issue in Georgia and that such formerly was the practice in Maryland. This statement appears to be erroneous. Sections 27-1502 to 17-1504 of the Georgia Code (1933) do indeed provide for a special plea and separate trial of the issue of insanity, but it seems quite clear that this refers only to insanity at the *time of trial*. Insanity at the time of the crime is provable under a plea of not guilty and is heard along with all other

tory of the Louisiana statute on the trial of the plea of insanity is concisely summarized by Dale E. Bennett, Professor of Law at Louisiana State University, as follows:⁷⁹

The question of how to handle the insanity defense has always been a source of difficulty. Prior to the 1928 code, Louisiana had followed the common law procedure whereby the defense of insanity at the time of the crime, along with all other defenses on the merits, could be raised under a general plea of "not guilty." This commingling of the insanity issue with other basic guilt issues would frequently result in serious jury confusion.

...

The code of Criminal Procedure sought to avoid these difficulties by establishing "insanity at the time of the crime" as a separate defense to the merits which must be set up by a special plea. It further directed that such defense "shall be filed, tried and disposed of prior to any trial of the plea of not guilty, and no evidence of insanity shall be admissible upon the trial of the plea of not guilty." In explaining this change the code commissioners stated, "It is thought that the provisions on this subject will result in determining the issue of insanity *vel non* before the trial on the merits, thereby minimizing the abuses which often arise from the use of the plea of insanity."

The new procedure contemplated separate trials and virtually required the impaneling of two juries. The first jury would determine the insanity plea, that is, whether the defendant was criminally responsible for his action. If they found him sane, a second jury would be impaneled to determine whether he had committed the crime charged. This created a serious practical problem in the smaller country parishes where jury venires were barely adequate to provide one twelve man jury for sensational murder or rape cases. In an effort to eliminate the necessity of dual juries, a 1932 statute deleted the provision requiring that the sanity plea be tried and disposed of prior to trial of the plea of "not guilty." However, no change was

defenses in a single trial. See *Orange v. State*, 77 Ga. App. 36, 47 S.E.2d 756 (1948); *Handspike v. State*, 203 Ga. 115, 45 S.E.2d 662 (1947).

The Maryland practice to which Weihofen apparently refers does not involve a separate trial of the issue of insanity, but rather a *special verdict* on the issue of insanity. In *Price v. State*, 159 Md. 491, 151 Atl. 409 (1930), the Maryland Court of Appeals interpreted an old statute of that state to mean that in every case where defendant had made an issue of his sanity, the jury was required to return a special verdict on his sanity at the time of the crime and on his sanity at the time of trial. The section in question, art. 59, § 7 of Maryland Code Annotated, has since been amended to provide that the jury shall render a special verdict on these issues only on demand of the prosecution or defense or by order of the court. But the special verdict is rendered along with the general verdict on the issues determining guilt and in but a single trial.

⁷⁹ Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11 (1953).

The Louisiana statutes as they stood in the four-year interval between the adoption of the Code of Criminal Procedure in 1928 and the 1932 statute mentioned by Professor Bennett are set forth in *State v. Burris*, 169 La. 520, 125 So. 580 (1929). The procedure under those provisions is described succinctly in *State v. Toon*, 172 La. 631, 135 So. 7 (1931). Recent correspondence with Professor Bennett indicates that he continues to oppose the restoration of the bifurcated trial in Louisiana.

made in the article listing insanity as a special plea, and the amendatory statute provided no substitute for the procedure eliminated—it did not specify when the plea of insanity was to be raised or how it was to be handled. During the past twenty years the procedure has become rather well set by judicial decision, but the results are somewhat anomalous. If the defendant simply pleads “not guilty,” evidence of insanity at the time of the crime is inadmissible; but if he pleads “not guilty by reason of insanity,” the door is wide open and all defenses may be urged simultaneously. . . . Even where the defendant wants it, he has no right to a separate trial on his insanity plea.⁸⁰

It might be added that language in a 1950 Louisiana case makes it clear that a separate trial is not permitted even if the trial judge wishes to grant defendant’s demand for a separate trial.⁸¹ The short of the matter, therefore, is that Louisiana now has the common-law practice of trying the issue of sanity along with the other issues in the case, but requires the defendant to interpose a special plea if he wishes to rely on insanity at trial.

One naturally hesitates to reach dogmatic conclusions about the procedural systems of jurisdictions that he has not had an opportunity to study and observe carefully, and in which he has not resided. However, there appears to be nothing in the bifurcation experiences of these states that tends to negate our conclusions concerning bifurcation in California.

CONCLUSION

California’s statutory provisions requiring the separate trial of the issue of insanity in criminal cases were designed to simplify issues for trial and to diminish unwarranted appeals to jury sympathy. But these objectives have been largely frustrated. The *Wells* decision allows the introduction of evidence of defendant’s state of mind at the trial of the issue of guilt. This is the very kind of evidence that, according to the philosophy of the separate trial procedure, tends to confuse the jury, even though it does not, strictly speaking, go to the issue of “insanity.” Indeed, the implication of the *Wells* decision is that to determine a defendant’s guilt without admitting testimony of his mental state at the time of the crime would be a denial of due process. The *Webb* case, in what seems a natural extension of the *Wells* rule, allows testimony of laymen to prove defendant’s mental state at the time of the crime. This is precisely the type of testimony that it was the purpose of the separate trial procedure to exclude from the first trial.

The separate trial procedure, as it stands today, results in duplication. The proof admissible to show defendant’s mental state at the time of the

⁸⁰ Bennett, *supra* note 79, at 22–23. (Footnotes omitted). See also Bennett, *Revision of Louisiana’s Code of Criminal Procedure—A Survey of Some of the Problems*, 18 LA. L. REV. 383, 402 (1958); Bennett, *The Insanity Defense—A Perplexing Problem of Criminal Justice*, 16 LA. L. REV. 484, 491 (1956).

⁸¹ *State v. Dowdy*, 217 La. 773, 47 So. 2d 496 (1950).

crime is substantially the same as that admissible to show insanity. No workable rule has been formulated, and probably none can be formulated, that would effectively differentiate between the two types of evidence.⁸²

The separate trial procedure was based on an inaccurate premise of law. It assumed that the issue of guilt and the issue of mental condition are separable. We submit that reason shows they are not separable, and that experience confirms this conclusion. We therefore believe that the separate trial procedure should be abolished.⁸³

⁸² As a practical matter the evil of duplication is probably not as serious as one might assume from the theoretical possibilities. When the same jury that decided the issue of guilt decides the insanity issue, it seems likely that counsel would stipulate that evidence heard at the first trial might be assumed to have been given at the second. See *People v. Johnson*, 178 Cal. App.2d 360, 369, 3 Cal. Rptr. 28 (1960). Doubtless similar stipulations are made where a jury is waived on the issue of insanity. Cf. *People v. Rittger*, 54 Cal. 2d 721, 729, 355 P.2d 645 (1960). Apparently the insanity issue is more often tried to the court in California than to the jury. See STATE OF CALIF., BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, CRIME IN CALIFORNIA—1959, p.75, table 29. Table 29, Pleas of Not Guilty by Reason of Insanity in California Superior Courts, 1959, shows 50 insanity pleas tried by jury (13 acquittals and 37 convictions), and 185 tried by the court (73 acquittals and 112 convictions). See also STATE OF CALIF., BUREAU OF CRIMINAL STATISTICS, DEP'T OF JUSTICE, CRIME IN CALIFORNIA—1960, p.108, table VI-14, which shows 48 insanity pleas tried by jury (12 acquittals and 36 convictions) and 172 by the court (70 acquittals and 102 convictions).

⁸³ We think the conclusion is inescapable that under the separate trial procedure admission at the first trial of evidence of the defendant's mental condition is necessary to rational adjudication of the degree of his culpability, if indeed not essential to due process of law. The distinction made in *Wells* between evidence that is admissible and evidence that is not admissible at the first trial to show mental condition is untenable. Therefore, the minimum acceptable statutory reform would be to provide that any competent evidence of the defendant's mental condition, relevant to the issue of his intent, shall be admissible at the first trial—the jury being instructed to consider it only on the issue of intent. This in no way implies a criticism of the requirement that a defendant who plans to rely on insanity as a defense must expressly plead that defense. For a recent illustration of the dilemma of bifurcation in the context of the requirement of the *Wells* case, see *People v. O'Connor*, 189 A.C.A. 311, 11 Cal. Rptr. 172 (1961). For a recent reminder that the intrinsic and perennial difficulties of judicial administration of insanity in criminal cases are not susceptible to easy palliatives such as bifurcation, see *People v. Castro*, 182 Cal. App. 2d 255, 5 Cal. Rptr. 906 (1960).